



## **DEPARTMENT OF THE INTERIOR**

### **National Indian Gaming Commission**

#### **25 CFR Part 571**

#### **RIN 3141-AA72**

#### **Audit Standards**

**AGENCY:** National Indian Gaming Commission.

**ACTION:** Final rule.

**SUMMARY:** The National Indian Gaming Commission (NIGC) is amending its Audit standards regulations. The amendments eliminate the Commission waiver requirement for reviewed financial statements and allow all operations grossing less than \$2 million in the previous fiscal year to submit reviewed financial statements provided that the tribe or tribal gaming regulatory authority (TGRA) permits the gaming operation to submit reviewed financials. The amendments also create a third tier of financial reporting for charitable gaming operations with annual gross revenues of \$50,000 or less where, if permitted by the tribe, a tribal or charitable gaming operation may submit financial information on a monthly basis to the tribe or the TGRA and in turn, the tribe or TGRA provides an annual certification to the NIGC regarding the gaming operation's compliance with the financial reporting requirements. The amendments also add a provision clarifying that the submission of an adverse opinion does not satisfy the regulation's reporting requirements.

**DATES:** This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Michael Hoenig, National Indian Gaming Commission; Telephone: (202) 632-7003.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100–497, 25 U.S.C. 2701 *et seq.*, was signed into law on October 17, 1988. The Act establishes the National Indian Gaming Commission (NIGC or Commission) and sets out a comprehensive framework for the regulation of gaming on Indian lands. On January 22, 1993, the Commission promulgated § 571.12 establishing audit standards for tribal gaming facilities. On July 27, 2009, the Commission amended the regulation to allow tribes with multiple facilities to consolidate their audit statements into one and to allow operations earning less than \$2 million in gross gaming revenue to file an abbreviated statement.

## **II. Development of the Rule**

On June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation announcing that the Agency intended to consult on several topics, including proposed changes to the Audit standards. Prior to consultation, the Commission released proposed discussion drafts of the regulations for review. The amendments to the Audit standards are designed to reduce the financial hurdles that small and charitable gaming operations face regarding the audit requirement. They also clarify which types of audit opinions satisfy the audit submission requirements. The Commission held two virtual consultation sessions in September and one virtual consultation in October of 2021 to receive tribal input on any proposed changes.

The Commission then published a proposed rule for notice and comments on June 1, 2022 at 87 FR 33091 and extended the comment period to August 1, 2022 on July 13, 2022 at 87 FR 41637.

## **III. Review of Public Comments**

The Commission received several general and specific comments on the proposed amendments.

*Comment:* One commenter proposed changes to eliminate the “prepared by a certified public accountant” language from the financial statements element of audit submissions.

*Response:* Commission agrees and has revised the rule accordingly.

*Comment:* One commenter proposed changes to clarify that the independent certified public accountant is the entity that may issue an adverse opinion and that any adverse opinions must still be submitted to the Commission.

*Response:* Commission agrees and has revised the rule accordingly.

*Comment:* One commenter expressed appreciation for the Commission's proposal to continue accepting adverse opinions that result from financial statements prepared in accordance with generally accepted accounting principles as promulgated by the Financial Accounting Standards Board rather than the Governmental Accounting Standards Board.

*Response:* Commission appreciates the comment and has maintained the exception in this rule.

*Comment:* Two commenters noted that the discussion draft circulated during the consultation rounds addressed disclaimed audits, but the proposed rule did not. They asked what the Commission's position is on disclaimed audits.

*Response:* At this time, the Commission has chosen to continue to accept disclaimed audit opinions, but may revisit the issue in the future. The Compliance Division will continue to carefully review each disclaimed opinion and the circumstances behind them.

*Comment:* One commenter expressed concern that tribes who go to the effort and expense of conducting an audit only to receive an adverse opinion are now subject to the same violation as a tribe that failed to submit anything at all.

*Response:* The reasons for receiving an adverse opinion and the difference in circumstances is more appropriately considered in the Civil Fine Assessment process, which requires the Chairman to weigh the unique facts and circumstances—including good faith efforts toward compliance—for each violation.

*Comment:* Two commenters are concerned that this creates a new basis for a violation without requiring an intermediate investigative or technical assistance step.

*Response:* Under the amended rule, if a tribe submits an adverse opinion, the Chair must still follow the procedures set forth in IGRA and NIGC regulations before taking any enforcement action. The Commission has determined that this amendment is necessary for the Chairman to protect the tribal gaming industry and its assets.

*Comment:* One commenter has requested more detail on how a tribe or TGRA must notify NIGC that it has given permission for a gaming operation to submit reviewed financial statements.

*Response:* Upon reviewing this section of the regulation, the Commission determined that notice is not necessary and has revised the rule accordingly. The Commission presumes by submission of the reviewed financial statements that the tribe or TGRA has given permission for the review process. If any questions arise about a gaming operation's authority to file reviewed statements, the Compliance Division will contact the tribe or TGRA for confirmation.

*Comment:* Several commenters asked what constitutes a "reason to believe" that a gaming operation's assets are at risk or are being misused under IGRA, and suggest that it should be more clearly defined.

*Response:* The Commission disagrees. Nothing in IGRA or NIGC regulations requires the Commission to reduce the audit requirements to a review of financial statements or submission of financial records to the TGRA. The Commission is taking this step to relieve the burden on certain small and charitable gaming operations. That being said, the Commission and the Chairman still have the regulatory responsibility placed on it under IGRA to ensure that the Tribe is the primary beneficiary of its gaming operations and that gaming revenues are used for the purposes set forth in IGRA. The Commission believes the standard set forth in this rule allows the NIGC to achieve both of those goals and adequately limits the Chairman's discretion to a good faith belief in a threat to gaming assets.

*Comment:* Several commenters noted that draft circulated during consultations included changes to the language regarding gaming operations consolidating audits for multiple places, facilities, or locations, but the proposed rule did not contain these changes.

*Response:* In the draft submitted for consultation, the language in § 571.12(d) stated: “If a tribe has multiple gaming facilities or operations on the tribe's Indian lands, the tribe may choose to satisfy the annual audit requirement of paragraph (b) with a consolidated audit if the following requirements are satisfied...” This change was inadvertently left out of the NPRM, and the language reverted back to that in the existing regulation, “If a gaming operation has multiple gaming places...” The Commission is reinstating the language proposed in the consultation draft, as it is more accurate.

*Comment:* One commenter expressed appreciation for the third tier of financial reporting established for operations with gross gaming revenue under \$50,000.

*Response:* Commission appreciates this comment.

*Comment:* Several commenters requested that the Commission increase the \$50,000 threshold for reviewed financial statements to \$100,000 or higher.

*Response:* Commission disagrees. The reviewed financial statements submitted to date do not indicate any benefit to raising the threshold at this time. The Commission may revisit this in the future if circumstances change.

#### **IV. Regulatory Matters**

##### *Regulatory Flexibility Act*

The rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

##### *Small Business Regulatory Enforcement Fairness Act*

The rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an effect on the economy of \$100 million or

more. The rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies or geographic regions. Nor will the rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the enterprises, to compete with foreign based enterprises.

#### *Unfunded Mandate Reform Act*

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

#### *Takings*

In accordance with Executive Order 12630, the Commission has determined that the rule does not have significant takings implications. A takings implication assessment is not required.

#### *Civil Justice Reform*

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the requirements of section 3(a) and 3(b)(2) of the Order.

#### *National Environmental Policy Act*

The Commission has determined that the rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

#### *Paperwork Reduction Act*

The information collection requirements contained in this rule were previously approved by the Office of Management and Budget (OMB) as required by 44 U.S.C. 3501 *et seq.* and assigned OMB Control Number 3141– 0001.

#### *Tribal Consultation*

The National Indian Gaming Commission is committed to fulfilling its tribal consultation obligations—whether directed by statute or administrative action such as Executive Order (EO) 13175 (Consultation and Coordination with Indian Tribal Governments)—by adhering to the

consultation framework described in its Consultation Policy published July 15, 2013. The NIGC's consultation policy specifies that it will consult with tribes on Commission Action with Tribal Implications, which is defined as: Any Commission regulation, rulemaking, policy, guidance, legislative proposal, or operational activity that may have a substantial direct effect on an Indian tribe on matters including, but not limited to the ability of an Indian tribe to regulate its Indian gaming; an Indian tribe's formal relationship with the Commission; or the consideration of the Commission's trust responsibilities to Indian tribes.

Pursuant to this policy, on June 9, 2021, the National Indian Gaming Commission sent a Notice of Consultation to the public, announcing the Agency intended to consult on several topics, including proposed amendments to NIGC audit standards. The Commission held two virtual consultation sessions in September and one virtual consultation session in October of 2021 to receive tribal input on proposed changes.

#### **List of Subjects in 25 CFR Part 571**

Gambling, Indian--lands, Indian--tribal government, Reporting and recordkeeping requirements.

Therefore, for reasons stated in the preamble, 25 CFR part 571 is amended as follows:

#### **PART 571 – MONITORING AND INVESTIGATIONS**

1. The authority citation for part 571 continues to read as follows:

**Authority:** 25 U.S.C. 2706(b), 2710(b)(2)(C), 2715, 2716.

2. Revise § 571.12 to read as follows:

##### **§ 571.12 Audit standards.**

(a) Each tribe shall prepare comparative financial statements covering all financial activities of each class II and class III gaming operation on the tribe's Indian lands for each fiscal year.

(b) A tribe shall engage an independent certified public accountant to conduct an annual audit of the financial statements of each class II and class III gaming operation on the tribe's Indian lands for each fiscal year. The audit and auditor must meet the following standards:

(1) The independent certified public accountant must be licensed by a state board of accountancy.

(2) Financial statements shall conform to generally accepted accounting principles and the annual audit shall conform to generally accepted auditing standards.

(3) The independent certified public accountant expresses an opinion on the financial statements. If the independent certified public accountant issues an adverse opinion, it still must be submitted, but does not satisfy this requirement unless:

(i) It is the result of the gaming operation meeting the definition of a state or local government and the gaming operation prepared its financial statements in accordance with generally accepted accounting principles (GAAP) as promulgated by Financial Accounting Standards Board (FASB); or

(ii) The adverse opinion pertains to a consolidated audit pursuant to paragraph (d) of this section and the operations not attributable to the adverse opinion are clearly identified.

(c) If a gaming operation has gross gaming revenues of less than \$2,000,000 during the prior fiscal year, the annual audit requirement of paragraph (b) of this section is satisfied if:

(1) The independent certified public accountant completes a review of the financial statements conforming to the standards for accounting and review services of the gaming operation; and

(2) The tribe or tribal gaming regulatory authority (TGRA) permits the gaming operation to submit a review of the financial statements according to this paragraph (c); provided that

(3) If the Chair of the NIGC has reason to believe that the assets of a gaming operation are not being appropriately safeguarded or the revenues are being misused under the Indian Gaming Regulatory Act (IGRA), the Chair may, at his or her discretion, require any gaming



operation subject to this paragraph (c) to submit additional information or comply with the annual audit requirement of paragraph (b) of this section.

(d) If a tribe has multiple gaming facilities or operations on the tribe's Indian lands, the tribe may choose to satisfy the annual audit requirement of paragraph (b) of this section with a consolidated audit if the following requirements are satisfied:

(1) The tribe is the owner of all the facilities;

(2) The independent certified public accountant completes an audit conforming to generally accepted auditing standards of the consolidated financial statements;

(3) The consolidated financial statements include consolidating schedules for each gaming place, facility, or location; and

(4) The independent certified public accountant expresses an opinion on the consolidated financial statement as a whole and subjects the accompanying financial information to the auditing procedures applicable to the audit of consolidated financial statements.

(e) If there are multiple gaming operations on a tribe's Indian lands and each operation has gross gaming revenues of less than \$2,000,000 during the prior fiscal year, the annual audit requirement of paragraph (b) of this section is satisfied if:

(1) The tribe chooses to consolidate the financial statements of the gaming operations;

(2) The consolidated financial statements include consolidating schedules for each operation;

(3) The independent certified public accountant completes a review of the consolidated schedules conforming to the standards on standards for accounting and review services for each gaming facility or location; and

(4) The independent certified public accountant expresses an opinion on the consolidated financial statements as a whole and subjects the accompanying financial information to the auditing procedures applicable to the audit of consolidated financial statements.

(f)(1) If a tribal or charitable gaming operation has gross gaming revenues of less than \$50,000 during the prior fiscal year, the annual audit requirement of paragraph (b) of this section is satisfied if:

(i) The gaming operation creates, prepares, and maintains records in accordance with Generally Accepted Accounting Principles;

(ii) At a minimum, the gaming operation provides the tribe or tribal gaming regulatory authority (TGRA) with the following financial information on a monthly basis:

(A) Each occasion when gaming was offered in a month;

(B) Gross gaming revenue for each month;

(C) Amounts paid out as, or paid for, prizes for each month;

(D) Amounts paid as operating expenses, providing each recipient's name; the date, amount, and check number or electronic transfer confirmation number of the payment; and a brief description of the purpose of the operating expense;

(E) All deposits of gaming revenue;

(F) All withdrawals of gaming revenue;

(G) All expenditures of net gaming revenues, including the recipient's name, the date, amount, and check number or electronic transfer confirmation number of the payment; and a brief description of the purpose of the expenditure; and

(H) The names of each employee and volunteer, and the salary or other compensation paid to each person;

(iii) The tribe or TGRA permits the gaming operation to be subject to this paragraph (f), and the tribe or TGRA informs the NIGC in writing of such permission; and

(iv) Within 30 days of the gaming operation's fiscal year end, the tribe or the TGRA provides a certification to the NIGC that the tribe or TGRA reviewed the gaming operation's financial information, and after such review, the tribe or TGRA concludes that the gaming operation conducted the gaming in a manner that protected the integrity of the games offered and

safeguarded the assets used in connection with the gaming operation, and the gaming operation expended net gaming revenues in a manner consistent with IGRA, NIGC regulations, the tribe's gaming ordinance or resolution, and the tribe's gaming regulations.

(2) If the tribe or TGRA does not or cannot provide the NIGC with the certification required by paragraph (f)(1)(v) of this section within 30 days of the gaming operation's fiscal year end, the gaming operation must otherwise comply with the annual audit requirement of paragraph (b) of this section.

(3) The tribe or TGRA may impose additional financial reporting requirements on gaming operations that otherwise qualify under this paragraph (f).

(4) If the Chair of the NIGC has reason to believe that the assets of a gaming operation are not being appropriately safeguarded or the revenues are being misused under IGRA, the Chair may, at his or her discretion, require any gaming operation subject to this paragraph (f) to submit additional information or comply with the annual audit requirement of paragraph (b) of this section.

(5) This paragraph (f) does not affect other requirements of IGRA and NIGC regulations, including, but not limited to, fees and quarterly fee statements (25 U.S.C. 2717; 25 CFR part 514); requirements for revenue allocation plans (25 U.S.C. 2710(b)(3)); requirements for individually-owned gaming (25 U.S.C. 2710(b)(4), (d); 25 CFR 522.10); minimum internal control standards for Class II gaming and agreed-upon procedures reports (25 CFR part 543); background and licensing for primary management officials and key employees of a gaming operation (25 U.S.C. 2710(b)(2)(F); 25 CFR parts 556, 558); and facility licenses (25 CFR part 559).

Dated: September 14, 2022.

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E. Sequoyah Simermeyer,  
Chairman.

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Jeannie Hovland,  
Vice Chair.

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